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## Combating Bullying by Amending the Individuals with Disabilities Education Act

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## INTRODUCTION

L.K.—a twelve-year-old girl originally diagnosed with autism but later reclassified as learning disabled—was placed in a classroom with neurotypical<sup>1</sup> children in a New York City public school where she was mercilessly bullied by her classmates.<sup>2</sup> Because of her disability, her school provided her with an Individualized Education Plan (IEP), a requirement under the Individuals with Disabilities Education Act (IDEA), which guarantees L.K. a free appropriate public education.<sup>3</sup> Despite the school administration’s awareness of the bullying that L.K. endured on a daily basis, no effort was made to address the bullying within her special education plan.<sup>4</sup>

L.K. was “ostracized in the classroom,” and the other students would “push her away for fun.”<sup>5</sup> She was chased and isolated during school hours and she received prank calls at home.<sup>6</sup> She complained to her parents almost every day about the bullying, which her father believed made her “emotionally unavailable to learn.”<sup>7</sup> Corroborating L.K.’s complaints, her one-on-one classroom aides testified that they witnessed the daily peer harassment.<sup>8</sup>

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<sup>1</sup> The term “neurotypical” will be used throughout this Comment to refer to individuals who are not on the autism spectrum. See *Neurotypical*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/neurotypical](http://www.oxforddictionaries.com/us/definition/american_english/neurotypical) (last visited May 22, 2014).

<sup>2</sup> *T.K. ex rel. L.K. v. N.Y.C. Dep’t of Educ.*, 779 F. Supp. 2d 289, 294–95 (E.D.N.Y. 2011).

<sup>3</sup> *Id.*; 20 U.S.C. § 1400(d)(1)(A) (2012).

<sup>4</sup> *T.K.*, 779 F. Supp. 2d at 295–96.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 296.

<sup>7</sup> *Id.* at 295 (citation omitted).

<sup>8</sup> *Id.* at 296.

Her parents tried to discuss the bullying incidents with the school principal so that they could be addressed within L.K.'s IEP, but their attempts were "rebuffed."<sup>9</sup> This was corroborated by the fact that the Department of Education had no incident reports on file that identified L.K. as a bullying victim.<sup>10</sup> Despite the parents' efforts to discuss the problem with the administration, the principal thought that it was not an "appropriate" topic for an IEP meeting and, therefore, made no adjustment to her special education plan.<sup>11</sup>

When the bullying did not subside, the child's parents removed her from the public school and enrolled her in a private school.<sup>12</sup> L.K.'s parents stated that the public school had failed them and sought a remedy.<sup>13</sup> They sued the New York City Department of Education under the IDEA for reimbursement of the private school tuition, arguing that L.K. was deprived of an appropriate education because the school did nothing to prevent the bullying she endured.<sup>14</sup> If L.K.'s public school had attempted to protect her from bullying by crafting a plan to address the bullying within her IEP, the bullying might have been prevented, and her parents might not have sued the school for tuition reimbursement. Most importantly, it likely would have provided L.K. the free appropriate public education that she is owed under the IDEA.<sup>15</sup>

The schoolyard bully is perhaps one of society's most notorious figures. While some degree of schoolyard teasing is still accepted, bullying is no longer tolerated.<sup>16</sup> However, it is still common, with about twenty-eight percent of youth in grades six through twelve

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<sup>9</sup> *Id.* at 294–95.

<sup>10</sup> *Id.* at 296.

<sup>11</sup> *Id.* at 295, 297.

<sup>12</sup> *Id.* at 295.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 293.

<sup>15</sup> 20 U.S.C. § 1400(d)(1)(A) (2012).

<sup>16</sup> *President and First Lady Call for a United Effort to Address Bullying*, WHITE HOUSE (Mar. 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/10/president-and-first-lady-call-united-effort-address-bullying>; *see generally* Dena T. Sacco et al., *An Overview of State Anti-Bullying Legislation and Other Related Laws*, THE KINDER & BRAVER WORLD PROJECT: RES. SERIES (Feb. 23, 2012), [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State\\_Anti\\_bullying\\_Legislation\\_Overview\\_0.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf) (providing state-by-state anti-bullying legislation throughout the United States).

bullied,<sup>17</sup> and a disproportionately large number of them have developmental disabilities.<sup>18</sup> Children with autism spectrum disorders (ASDs) are especially likely to be targeted.<sup>19</sup>

This Comment will discuss remedies for parents of bullied children with ASDs and propose legislative reform that may provide a solution to the bullying epidemic. Part I provides a general background on bullying and its prevalence in schools, demonstrating that bullying can affect all students. Part II discusses ASDs, identifies the general characteristics, illustrates the growing prevalence, and describes why children with autism are bullied two to three times more often than neurotypical children.<sup>20</sup> Part III illustrates how being bullied can interfere with or completely deprive a child of an education. Part IV discusses a school's duty to protect children from bullying and the limited remedies available to parents when their children experience bullying. Part V describes what the IDEA provides students with disabilities and what remedies are available. Part VI discusses IEPs, the key IDEA tool used to deliver appropriate education to students with disabilities, and proposes an amendment to the IDEA to address bullying of disabled children. It argues that Congress should amend the IDEA to require schools to address the child's social development and abilities within IEPs to prevent bullying and allow disabled students to have access to an adequate education.

## I

### BULLYING: PREVALENCE IN SCHOOLS

Bullying has been defined as “a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child. . . . Bullying is a sustained, cruel, and inescapable torment that sometimes continues for years.”<sup>21</sup> Although bullying in schools was traditionally considered a simple nuisance of

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<sup>17</sup> *Student Reports of Bullying and Cyber-Bullying: Results from the 2011 School Crime Supplement to the National Crime Victimization Survey*, NAT'L CTR. FOR EDUC. STATISTICS (Aug. 2013), <http://nces.ed.gov/pubs2013/2013329.pdf>.

<sup>18</sup> *Bullying Statistics*, PACER CTR., <http://www.pacer.org/bullying/about/media-kit/stats.asp> (last visited May 6, 2014).

<sup>19</sup> Connie Anderson, *IAN Research Report: Bullying and Children with ASD*, INTERACTIVE AUTISM NETWORK (Mar. 26, 2012), [http://www.iancommunity.org/cs/ian\\_research\\_reports/ian\\_research\\_report\\_bullying](http://www.iancommunity.org/cs/ian_research_reports/ian_research_report_bullying).

<sup>20</sup> *Bully Statistics*, *supra* note 18.

<sup>21</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 645 (2004).

coming of age, the public's general perception of bullying changed after the shooting at Columbine High School in 1999.<sup>22</sup> Because bullying has become a national concern, many bullying prevention initiatives have emerged throughout the country to spread awareness and prevention tips.<sup>23</sup> The anti-bullying movement has become extremely powerful because of the negative effects—including mental, physical, and academic consequences—on bullied children.<sup>24</sup>

While bullying can occur in all populations, research shows that those most at risk of being bullied are perceived as “different” or weak; suffer from depression, anxiety, and low self-esteem; are less popular; and do not socialize well with others.<sup>25</sup> Students with disabilities often have some or all of these characteristics, meaning that the students are targeted because of their conditions.<sup>26</sup> They tend to be “less popular, have fewer friends, and struggle more with loneliness and peer rejection, increasing the likelihood they will become the victim of bullying.”<sup>27</sup> For this reason alone, students with disabilities are at high risk for being bullied.<sup>28</sup> In addition, neurotypical students often harass students with disabilities simply

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<sup>22</sup> T.K. *ex rel.* L.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 297–98 (E.D.N.Y. 2011) (citing Bill Dedman, *Secret Service Findings Overturn Stereotypes*, CHI. SUN-TIMES, Oct. 15–16, 2000, at 9, available at <http://powerreporting.com/shoot.pdf>) (noting that the U.S. Secret Service investigated thirty-seven shootings following the Columbine High School shootings in 1999 and found that in “two-thirds of those cases, the shooter described feeling bullied, persecuted, or threatened at school”).

<sup>23</sup> See generally BULLY POLICE USA, [www.bullypolice.org](http://www.bullypolice.org) (last updated Apr. 2014) (publishing information on states' anti-bullying statutes); PACER CTR., <http://www.pacer.org/bullying/about/> (last visited Apr. 27, 2014) (seeking to educate communities on how to address bullying locally); *President and First Lady Call for a United Effort to Address Bullying*, *supra* note 16 (launching a website at the White House Conference on Bullying Prevention to provide information on bullying for youth, parents, and educators, with President Barack Obama stating that the main goal of the Conference was to “dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up. It's not.”).

<sup>24</sup> Adrienne Nishina, Jaana Juvonen & Melissa R. Witkow, *Sticks and Stones May Break My Bones, but Names Will Make Me Feel Sick: The Psychosocial, Somatic, and Scholastic Consequences of Peer Harassment*, 34 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 37, 37, 45–46 (2005).

<sup>25</sup> *Risk Factors*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/factors/index.html> (last visited Mar. 13, 2014).

<sup>26</sup> See *Bullying and Youth with Disabilities and Special Health Needs*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/groups/special-needs/index.html> (last visited Mar. 13, 2014).

<sup>27</sup> T.K., 779 F. Supp. 2d at 303.

<sup>28</sup> See Anderson, *supra* note 19; see also *Bullying and Youth with Disabilities and Special Health Needs*, *supra* note 26.

because they are disabled; the bullying is directed at the disabilities.<sup>29</sup> On average, sixty percent of children with disabilities are bullied, compared to twenty-five percent of children overall.<sup>30</sup> Children with ASDs are bullied at a slightly higher rate than children with other disabilities.<sup>31</sup>

## II

### AUTISM SPECTRUM DISORDERS AND SUSCEPTIBILITY TO BULLYING

For decades, autism flew beneath the radar of most Americans' consciousnesses because its definition is somewhat amorphous and its causes are not clear. Although autism was first diagnosed in 1943 and Asperger syndrome the next year,<sup>32</sup> most people have become aware of ASDs only recently. Awareness has spread in large part because more and more children are being diagnosed with these disorders. Once thought of as a rare condition,<sup>33</sup> diagnosed in approximately one in five thousand children in 1975,<sup>34</sup> today, the Centers for Disease Control and Prevention's Autism and Developmental Disabilities Monitoring Network estimates that one out of sixty-eight children will be diagnosed with an ASD by age eight.<sup>35</sup>

Additionally, autism awareness has increased because of the efforts of advocacy organizations such as Autism Society<sup>36</sup> and Autism Speaks,<sup>37</sup> new research about the causes of and treatments for

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<sup>29</sup> T.K., 779 F. Supp. 2d at 303 (citing Jonathan Young, Ari Ne'eman & Sara Gelser, *Bullying and Students with Disabilities*, NAT'L COUNCIL ON DISABILITY (2011), <http://www.ncd.gov/publications/2011/March92011>).

<sup>30</sup> *Bullying and Harassment of Students with Disabilities*, PACER CTR., <http://www.pacer.org/bullying/resources/students-with-disabilities/> (last visited Nov. 18, 2013).

<sup>31</sup> Anderson, *supra* note 19 (reporting that sixty-three percent of children with an ASD are bullied).

<sup>32</sup> Brittney Johnson, *Some Key Dates in Autism History*, WASH. POST (July 1, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062703062.html>.

<sup>33</sup> *Prevalence FAQ*, AUTISM SPEAKS, <http://www.autismspeaks.org/what-autism/prevalence/prevalence-faq> (last visited Dec. 1, 2013).

<sup>34</sup> *Autism Prevalence on the Rise*, AUTISM SPEAKS, [http://www.autismspeaks.org/docs/Prevalence\\_Graph\\_12\\_18\\_2009.pdf](http://www.autismspeaks.org/docs/Prevalence_Graph_12_18_2009.pdf) (last visited Dec. 1, 2013).

<sup>35</sup> Jon Baio, *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 28, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm>.

<sup>36</sup> *About the Autism Society*, AUTISM SOC'Y, <http://www.autism-society.org/about-the-autism-society/> (last visited Dec. 1, 2013) (Autism Society was founded in 1965 to increase awareness about autism and provide information to the public.).

<sup>37</sup> *About Us*, AUTISM SPEAKS, <http://www.autismspeaks.org/about-us> (last visited Dec. 1, 2013) (Founded in 2005, Autism Speaks advocates for autism awareness, supports the

autism,<sup>38</sup> and even Dustin Hoffman's portrayal of an autistic man in the 1988 film *Rain Man*.<sup>39</sup> The neurological disorder is defined as follows:

[A] range of complex neurodevelopment disorders, characterized by social impairments, communication difficulties, and restricted, repetitive, and stereotyped patterns of behavior. Autistic disorder, sometimes called autism or classical ASD, is the most severe form of ASD, while other conditions along the spectrum include a milder form known as Asperger syndrome, and childhood disintegrative disorder and pervasive developmental disorder not otherwise specified (usually referred to as PDD-NOS). Although ASD varies significantly in character and severity, it occurs in all ethnic and socioeconomic groups and affects every age group.<sup>40</sup>

Some of the most common signs of autism are impaired social interaction or indifference to engaging socially with peers, avoidance of eye contact, inability or difficulty interpreting social cues, and making repetitive movements or vocalizations.<sup>41</sup> These symptoms of autism can be the reasons that children on the autism spectrum are targets of bullying.<sup>42</sup>

#### A. Children with Autism Are Bullied More than Neurotypical Children

A survey conducted by the Interactive Autism Network (IAN) found that in 2012, some sixty-three percent of surveyed children

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search for causes of autism, and funds research on the prevention and treatment of autism.).

<sup>38</sup> See, e.g., *Research*, CTR. FOR AUTISM RES., <http://www.centerforautismresearch.com/research/> (last visited Mar. 14, 2014).

<sup>39</sup> *Autism: Rise of a Disorder*, L.A. TIMES (Dec. 6, 2011, 1:43 PM), <http://timelines.latimes.com/autism-history/>; see Roger Ebert, *Rain Man*, ROGEREBERT.COM (Dec. 16, 1988), <http://www.rogerebert.com/reviews/rain-man-1988> (Acclaimed film critic Roger Ebert commented in his review of the film *Rain Man*, "I think the film is about acceptance.").

<sup>40</sup> *Autism Fact Sheet*, NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, [http://www.ninds.nih.gov/disorders/autism/detail\\_autism.htm](http://www.ninds.nih.gov/disorders/autism/detail_autism.htm) (last updated Apr. 16, 2014).

<sup>41</sup> *Signs and Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/autism/signs.html> (last updated Mar. 20, 2014); see also *What Is Autism Spectrum Disorder (ASD)?*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/publications/a-parents-guide-to-autism-spectrum-disorder/index.shtml> (last visited Dec. 1, 2013).

<sup>42</sup> Anahad O'Connor, *School Bullies Prey on Children with Autism*, N.Y. TIMES (Sept. 3, 2012, 4:01 PM), [http://well.blogs.nytimes.com/2012/09/03/school-bullies-prey-on-children-with-autism/?\\_r=0](http://well.blogs.nytimes.com/2012/09/03/school-bullies-prey-on-children-with-autism/?_r=0) ("Many of the defining characteristics of autism are the ones that put them at greatest risk of bullying.").

ages six through fifteen with an ASD had experienced bullying.<sup>43</sup> Not only are these children bullied in the traditional sense, but other children also “intentionally ‘trigger[]’ [them] into meltdowns or aggressive outbursts.”<sup>44</sup> To illustrate the disparity of bullying rates between autistic children<sup>45</sup> and neurotypical children, the IAN study reported that thirty-nine percent of the children with an ASD were bullied the prior month, whereas only twelve percent of their neurotypical siblings were bullied.<sup>46</sup> The rate of bullying was fifty-seven percent when a child with an ASD attempted to interact socially with peers compared to twenty-five percent of those who preferred to play alone.<sup>47</sup> Because children with ASDs struggle to understand sarcasm and humor, an autistic child may be teased and not even recognize it.<sup>48</sup> Therefore, while the sixty-three percent rate is already high, it is possible that some children with an ASD do not report bullying because they do not understand it to be harassment as a neurotypical child would. Consequently, the true prevalence of bullying incidents might be even higher. The statistics raise the question as to why these children are targeted.

*B. Why Children with ASDs Are Bullied More than Neurotypical Children*

Several factors contribute to why children with autism spectrum disorders are bullied at a higher rate than neurotypical children. Autistic children who are mainstreamed into classes with neurotypical children, “where their quirks and unusual mannerisms stand out and they are more exposed to bullies,” are at the greatest risk of being bullied.<sup>49</sup> These quirks and mannerisms may include non-typical repetitive behavior such as vocalizations or physical movements,<sup>50</sup> which might include “hand flapping, unusually postured fingers, or

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<sup>43</sup> Anderson, *supra* note 19.

<sup>44</sup> *Id.*

<sup>45</sup> *Bullying Statistics*, *supra* note 18 (stating that children with autism are two to three times more likely to be bullied than their neurotypical counterparts).

<sup>46</sup> Anderson, *supra* note 19 (focusing the study on 1167 children ages six through fifteen).

<sup>47</sup> *Id.*

<sup>48</sup> O'Connor, *supra* note 42.

<sup>49</sup> *Id.*

<sup>50</sup> See Michelle Turner, *Annotation: Repetitive Behaviour in Autism: A Review of Psychological Research*, 40 J. CHILD PSYCHOL. & PSYCHIATRY 839, 842 (1999).



rocking back and forth.”<sup>51</sup> Children with ASDs can be perceived by their peers as “annoying and disruptive,” and other children may not understand some of their behaviors such as seemingly unexplained outbursts or injuring themselves.<sup>52</sup>

Children with Asperger syndrome who are plagued by social deficits are “perfect targets” for bullying.<sup>53</sup> Behaviors that are associated with a higher probability of being bullied are clumsiness, deficient hygiene, rigid rule following, boring others by continuing to discuss a particular favorite topic, numerous meltdowns, and general inflexibility.<sup>54</sup> The rate at which these children are bullied is particularly alarming because of the detrimental effects on the psychological well-being of youth in general and their access to education.

### III

#### HOW BULLYING AT SCHOOL IMPEDES A CHILD’S EDUCATION

Peer harassment can be very harmful to a child’s mental health, physical health, and academic performance. Bullying has been shown to increase depression, anxiety, and the risk of suicide.<sup>55</sup> Because an increase of stress hormones can suppress immune system function, bullied youths are more likely to suffer from colds or illnesses.<sup>56</sup> A child’s physical health can also suffer; bullying has been linked to headaches, stomachaches, and decreased energy—all of which can be symptoms of depression.<sup>57</sup>

Peer harassment has been linked with students’ inability to focus in the classroom and may also prompt students’ absence from school.<sup>58</sup> “Bullying and inappropriate peer harassment in its many forms provides an unacceptable toxic learning environment.”<sup>59</sup> Although

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<sup>51</sup> KATHLEEN M. MCCOY, AUTISM FROM THE TEACHER’S PERSPECTIVE: STRATEGIES FOR CLASSROOM INSTRUCTION 164 (2011) (citation omitted).

<sup>52</sup> Dave Kolpack, *Disruptive Behavior by Autistic Kids Stirs Furor*, USA TODAY (Aug. 13, 2008, 4:35 PM), [http://usatoday30.usatoday.com/news/nation/2008-08-13-4034241585\\_x.htm](http://usatoday30.usatoday.com/news/nation/2008-08-13-4034241585_x.htm).

<sup>53</sup> Anderson, *supra* note 19 (citation omitted) (internal quotation marks omitted).

<sup>54</sup> *Id.*

<sup>55</sup> Nishina, Juvonen & Witkow, *supra* note 24, at 37, 45.

<sup>56</sup> *Id.* at 46.

<sup>57</sup> *Id.* at 38, 45–46.

<sup>58</sup> *Id.* at 38.

<sup>59</sup> T.K. *ex rel.* L.K. v. N.Y.C. Dep’t of Educ., 779 F. Supp. 2d 289, 293 (E.D.N.Y. 2011).

some teasing during childhood might be expected, when bullying rises to a certain level, it can severely affect the child's access to a meaningful education.

#### IV

##### REMEDIES FOR BULLIED CHILDREN AND PARENTS

In light of the increasing awareness of the prevalence of bullying and its consequences, it is important to consider the remedies for bullying in schools. States across the country have enacted anti-bullying legislation with the goal of changing the educational environment to prevent bullying.<sup>60</sup> When bullying prevention plans fail, parents have filed lawsuits against schools for failing to protect their children from bullying. This Part will first discuss anti-bullying statutes and their limits. It will then discuss constitutional remedies and remedies for bullying under federal antidiscrimination statutes. Ultimately, this Part will show that none of these options provide an effective solution to the bullying issue because they only become available after a child has already suffered from bullying.

##### *A. Anti-Bullying Legislation in Individual States and School-Wide Bullying Prevention Plans*

Anti-bullying legislation cannot be considered a remedy for bullied students because the laws are inadequate to prevent bullying.<sup>61</sup> Fourteen years ago, Georgia was the first state to pass anti-bullying legislation “[i]n the aftermath of the 1999 Columbine shootings and in response to a bullying-related suicide.”<sup>62</sup> State legislatures enacted more than 120 bills nationwide between 1999 and 2010 “to address bullying and related behaviors in schools.”<sup>63</sup>

Today, forty-nine states have passed such legislation, the only outlier being Montana.<sup>64</sup> In 2011, the U.S. Department of Education

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<sup>60</sup> See *infra* text accompanying notes 61–74.

<sup>61</sup> See Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 70 (2005).

<sup>62</sup> VICTORIA STUART-CASSEL, ARIANA BELL & J. FRED SPRINGER, ANALYSIS OF STATE BULLYING LAWS AND POLICIES, U.S. DEP’T OF EDUC. xi (2011), available at <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>.

<sup>63</sup> *Id.* at 15.

<sup>64</sup> See BULLY POLICE USA, *supra* note 23. Although Montana lacks legislation that specifically requires school districts to create a policy addressing peer harassment, the Montana Office of Public Instruction implemented a new rule in July 2013 requiring each public school to address bullying or risk losing accreditation. See *Students, Parents,*

analyzed the anti-bullying statutes of the forty-six states that had enacted them at that time.<sup>65</sup> While the laws of each state are different,<sup>66</sup> generally, they require mandatory reporting of bullying, and schools must adopt anti-bullying policies that include definitions of bullying and harassment<sup>67</sup> and plans for disciplining bullies.<sup>68</sup> Despite these requirements of schools, the statutes do not give bullied students a cause of action against schools if these efforts are not in place or fail to prevent bullying.

The statutes have been criticized for being ineffective.<sup>69</sup> One scholar suggested the statutes have done little to prevent bullying.<sup>70</sup> A group of investigative reporters flagged Massachusetts's legislation as being "toothless" and suggested that in large part its failure is due to

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*Educators....*, MONT. OFFICE OF PUB. INSTRUCTION, <http://opi.mt.gov/Programs/TitlePrgrms/SafeSchools/bully.html> (last modified May 13, 2014 1:39 PM). Thus, even without anti-bullying legislation, a similar purpose was served. *See id.* Responding to why he voted against the bill, Montana Representative Jerry Bennett commented that the solution is for parents to "use common sense and unplug their children's mobile devices to help them avoid ridicule." *Montana Schools Step in After Legislature Refuses Anti-Bullying Bills*, MISSOULIAN (June 9, 2013, 9:15 AM), [http://missoulian.com/news/local/montana-schools-step-in-after-legislature-refuses-anti-bullying-bills/article\\_2ae2fcac-d116-11e2-9a7a-001a4bcf887a.html](http://missoulian.com/news/local/montana-schools-step-in-after-legislature-refuses-anti-bullying-bills/article_2ae2fcac-d116-11e2-9a7a-001a4bcf887a.html).

<sup>65</sup> STUART-CASSEL, BELL & SPRINGER, *supra* note 62.

<sup>66</sup> *Id.* at 18. The analysis discerned four different models among them, which are as follows: (1) twenty-five states have laws that set expectations for school districts to develop individual policies, and control is centralized in the legislature; (2) eleven states have laws that set expectations for school districts to develop local policies, and the policy development is transferred to the school district; (3) six states have laws that require school districts to develop policies, but the state education agencies maintain discretion to formulate policy provisions; and (4) four states have laws that require school districts to develop a policy that conforms to the state's model policy, and the state's department of education maintains control. *Id.* at 19.

<sup>67</sup> *See* Sacco et al., *supra* note 16, at 4–5.

<sup>68</sup> *Id.* at 8.

<sup>69</sup> Daniel Adams et al., *Anti-Bullying Program Is Toothless in Massachusetts*, NEW ENGLAND CTR. FOR INVESTIGATIVE REPORTING (July 19, 2013), <http://necir-bu.org/investigations/anti-bullying-program-is-toothless-in-massachusetts/>; Marc Brackett & Diana Divecha, *School Anti-Bullying Programs Ineffective*, HARTFORD COURANT (Sept. 6, 2013), [http://articles.courant.com/2013-09-06/news/hc-op-brackett-school-bullying-programs-ineffectiv-20130906\\_1\\_bullying-prevention-programs-expelling-bullies-school-year](http://articles.courant.com/2013-09-06/news/hc-op-brackett-school-bullying-programs-ineffectiv-20130906_1_bullying-prevention-programs-expelling-bullies-school-year); Christopher Emdin, *5 Reasons Why Current Anti-Bullying Initiatives Don't Work*, HUFFINGTON POST (Oct. 18, 2011, 6:29 PM), [http://www.huffingtonpost.com/christopher-emdin/5-reasons-why-antibullyin\\_b\\_1017810.html](http://www.huffingtonpost.com/christopher-emdin/5-reasons-why-antibullyin_b_1017810.html).

<sup>70</sup> David Ellis Ferster, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 GA. L. REV. 191, 195 (2008) [hereinafter *Deliberately Different*] (citing Fred Hartmeister & Vickie Fix-Turkowski, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 1, 21 (2005)).

underfunding, which allows schools to do little more than hold an occasional school-wide assembly on bullying.<sup>71</sup> The National Autism Association reported that large-scale efforts such as school lectures are not effective to prevent bullying.<sup>72</sup> Data showed that the percentage of students who reported being bullied was the same a year before and a year after the legislation went into effect.<sup>73</sup> *The Hartford Courant* reported that “[a]nti-bullying programs don’t work in part because they address symptoms and not underlying causes. Schools will be bully-free when social and emotional learning programs are taken as seriously as reading and math.”<sup>74</sup>

If these statutes do little more than serve as symbols of the nationwide call to end bullying, they are inadequate. The next sections will discuss what remedies are available, starting with a discussion of whether schools have a constitutional duty to protect students from bullying.

### *B. Schools’ Duty to Protect Children from Bullying*

Generally, courts have found that schools do not have a constitutional duty to protect students from being bullied. Courts have also concluded that federal statutes prohibiting discrimination in schools do not provide a remedy for bullied students.

The Due Process Clause of the Constitution does not require schools to protect students from bullying. Every federal court of appeals that has addressed the issue has held that schools do not have a constitutional duty to protect students from bullying.<sup>75</sup> The Supreme Court established that states do not have a constitutional duty to protect individuals “against private violence.”<sup>76</sup> However, Fourteenth Amendment protections are triggered where a “special relationship” exists between the school and the child.<sup>77</sup> A special relationship arises when a state takes an individual into custody and imposes a limitation on his freedom; his deprivation of liberty triggers constitutional protections under the Due Process Clause.<sup>78</sup>

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<sup>71</sup> Adams et al., *supra* note 69.

<sup>72</sup> A&S *Bullying*, NAT’L AUTISM ASS’N, <http://www.autismsafety.org/bullying.php> (last visited Mar. 14, 2014).

<sup>73</sup> Adams et al., *supra* note 69.

<sup>74</sup> Brackett & Divecha, *supra* note 69.

<sup>75</sup> *Morrow v. Balaski*, 719 F.3d 160, 170 (3d Cir. 2013).

<sup>76</sup> *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989).

<sup>77</sup> *Morrow*, 719 F.3d at 167.

<sup>78</sup> *Id.* at 167–68 (citing *DeShaney*, 489 U.S. at 199–200).

The Fourth Circuit Court of Appeals considered a claim that a public school violated a student's constitutional right to due process by failing to protect him from bullying.<sup>79</sup> The court held that the school had no duty to protect the child because the state had not taken full responsibility of a student's care simply by virtue of the fact that the child must attend school.<sup>80</sup> The level of control schools have over students due to compelled attendance is not enough to give rise to a "special relationship" that would trigger Fourteenth Amendment protections because "the student is not in physical custody and, along with parental help, is able to care for his basic human needs."<sup>81</sup>

Similarly, in *Morrow v. Balaski*, the Third Circuit found that a school did not owe a constitutional duty to protect two bullied sisters.<sup>82</sup> The dissent in *Morrow* opined that the school owed the two students a duty to keep them safe from bullying because the school "compelled [] attendance, exercised extensive control over not only the student victims but also the specific threat at issue in the case—a violent bully . . . ."<sup>83</sup> However, the majority held that the school's authority over students *in loco parentis* does not mean that schools have a duty to protect students from all bullies.<sup>84</sup> Therefore, because schools do not owe students a duty of protection, there is no constitutional remedy for bullying. The next two sections will discuss remedies under federal anti-discrimination statutes.

### *C. Discrimination Claims Under Title IX of the Education Amendments of 1972*

Title IX of the Education Amendments of 1972, prohibiting discrimination in schools that receive federal funds,<sup>85</sup> does not provide an effective remedy for bullied children for two reasons. First, Title IX only prohibits sex-based discrimination,<sup>86</sup> which means it is not general enough to present a remedy for all bullying incidents.

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<sup>79</sup> *Stevenson ex rel. Stevenson v. Martin Cnty. Bd. of Educ.*, 3 F. App'x 25, 27 (4th Cir. 2001).

<sup>80</sup> *Id.* at 27, 32.

<sup>81</sup> *Id.* at 30–31.

<sup>82</sup> 719 F.3d. at 163, 176.

<sup>83</sup> *Id.* at 188 (Fuentes, J., dissenting).

<sup>84</sup> *Id.* at 171–72.

<sup>85</sup> 20 U.S.C. § 1681(a) (2012).

<sup>86</sup> *Id.*

Second, even if the bullying was based on sex or gender, the conduct might not be sufficiently severe to trigger Title IX protections.

The Supreme Court has held that a school can be liable under Title IX for sex-based discrimination and sexual abuse or harassment between a teacher and a student,<sup>87</sup> or between two students,<sup>88</sup> where the school district had knowledge of such acts and was “deliberately indifferent” to them.<sup>89</sup> Claims under Title IX could be successful if the school was deliberately indifferent to harassment that was so “severe, pervasive, and objectively offensive” that the harassment “deprive[d] the victims of access to the educational opportunities or benefits provided by the school.”<sup>90</sup>

In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, a student-on-student sexual harassment case,<sup>91</sup> the Supreme Court touched on the topic of non-sex-based bullying in the Title IX context when it said that “simple acts of teasing and name-calling” will not be enough to obtain relief under Title IX.<sup>92</sup> The majority opined that the acts of a student who skips class to avoid the “school bully” are insufficient to rise to the level of depriving access to equal education, and, thus, would not be successful causes of action under Title IX.<sup>93</sup> In this case, the Court essentially precluded bullying cases under Title IX by preemptively concluding that bullying claims would not be sufficiently “severe, pervasive, and objectively offensive.”<sup>94</sup> The Court did not want to “impose more sweeping liability” than Title IX required.<sup>95</sup>

Many students would be unsuccessful suing under Title IX with a bar that high. This interpretation gives any court the discretion to find that the facts fall outside the prescribed severity or pervasiveness. Regardless, the antidiscrimination statute only applies to claims with both a sexual element and the requisite level of discrimination;<sup>96</sup> thus, Title IX is inapplicable to most bullying claims.

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<sup>87</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277, 292–93 (1998).

<sup>88</sup> *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

<sup>89</sup> *Id.* at 642.

<sup>90</sup> *Id.* at 650.

<sup>91</sup> *Id.* at 632.

<sup>92</sup> *Id.* at 652.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> 20 U.S.C. § 1681(a) (2012).

*D. Claims Under Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against individuals with disabilities in any federally funded program, including education,<sup>97</sup> also does not provide an ideal remedy for bullied children. The Act imposes an affirmative duty on schools to provide students with a free appropriate public education (FAPE),<sup>98</sup> which is defined as a special education provided by aids or services that will allow the person to meet his or her educational needs.<sup>99</sup> However, to prevail on a cause of action under § 504, the plaintiff must show, *inter alia*, that “he was denied the benefits of the program *solely by reason of his disability*.”<sup>100</sup> The remedy is not available where the child is denied an appropriate education because of bullying.

Section 504 “provide[s] a cause of action for failure of a public school to provide a FAPE” only in very limited circumstances.<sup>101</sup> Where parents can prove a child was denied a FAPE because of discrimination “solely” based on the child’s disability, parents can bring an action under § 504 for money damages. In the bullying context, parents would have to prove that discrimination caused the failure to protect the child from bullying. While possible, this avenue appears to be limited.<sup>102</sup>

However, even if a § 504 claim is successful, this remedy will still not cure the problem because the bullying will have already occurred. Although a successful lawsuit may provide the child’s parents with monetary damages, it will not eliminate the emotional or physical damage because the remedy only becomes available after a child has already suffered from bullying.

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<sup>97</sup> 29 U.S.C. § 794(a)–(b) (2012).

<sup>98</sup> *Id.* § 794(a). The IDEA also requires schools to provide students with a free appropriate public education. 20 U.S.C. § 1400(d)(1)(A).

<sup>99</sup> 34 C.F.R. § 104.33(b) (2013).

<sup>100</sup> *Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).

<sup>101</sup> *C.O. v. Portland Pub. Sch.*, 679 F.3d 1162, 1168 (9th Cir. 2012).

<sup>102</sup> One scholar asserts that for § 504 bullying cases, courts would likely apply the Title IX “deliberate indifference” standard that the Supreme Court used in sexual harassment cases like *Davis* because the language of Title IX is similar to § 504. *Deliberately Different*, *supra* note 70, at 204. The scholar argued that if courts use this standard, it would “provide[] little hope” for bullied children with disabilities because the standard is simply too high a barrier. *Id.*

## V

## IDEA: PURPOSE, REQUIREMENTS, AND IMPLEMENTATION

Although neurotypical children who are bullied in school have few or no options to find relief through the courts, children with disabilities are protected by the IDEA, which also provides an avenue for relief through the courts. Congress originally enacted the Education for All Handicapped Children Act in 1975 to ensure that children with disabilities would receive the same full educational opportunities that neurotypical children receive.<sup>103</sup> The Act's name was changed to Individuals with Disabilities Education Act in 1990,<sup>104</sup> and, most recently, substantively amended in 2004<sup>105</sup> and technically amended in 2010.<sup>106</sup> The IDEA provides federal funding to states that implement the Act's system of providing special education through local educational agencies.<sup>107</sup> Section 1400(d)(1)(A) of the Act explains that its purposes are to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."<sup>108</sup>

The IDEA guarantees children with disabilities, including ASDs, a free appropriate public education, which means a free education "provided in conformity with the individualized education program."<sup>109</sup> An individualized education program (IEP) is a written statement developed and revised at least annually for each child with a disability.<sup>110</sup> The IEP presents information regarding the child's current academic achievement and functional performance, and it maps out measurable academic and functional goals.<sup>111</sup>

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<sup>103</sup> Education for All Handicapped Children Act of 1975, S. REP. NO. 94-168, at 8 (1975); Pub. L. No. 94-142, 89 Stat. 773 (1975); U.S. DEP'T OF EDUC. OFFICE OF SPECIAL EDUC. PROGRAMS, HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, *available at* <http://www2.ed.gov/policy/speced/leg/idea/history.pdf> (last visited May 4, 2014).

<sup>104</sup> Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103 (1990).

<sup>105</sup> Amendments to the Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

<sup>106</sup> Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (amending the IDEA by replacing "mental retardation" with "intellectual disabilities").

<sup>107</sup> 20 U.S.C. §§ 1407, 1411 (2012).

<sup>108</sup> *Id.* § 1400(d)(1)(A).

<sup>109</sup> *Id.* § 1401(9)(A)–(D).

<sup>110</sup> *Id.* § 1401(14).

<sup>111</sup> *Id.* § 1414(d)(1)(A).



The first step in the process of developing an IEP is an evaluation of the child that is conducted pursuant to parental consent.<sup>112</sup> The evaluation process is two-fold. First, a child is evaluated to determine what, if any, disability the child has.<sup>113</sup> Second, if the child is disabled, the child is evaluated to determine the child's functional, developmental, and academic abilities, with the goal of "enabling the child to be involved in and progress in the general education curriculum . . . ."<sup>114</sup>

After the child is evaluated, an IEP team will assemble to create the child's education plan based on the needs of the child. In addition to teachers and specialists who will interpret the evaluation results,<sup>115</sup> the parent is an important member of the child's IEP team. The parents will provide information during the evaluation process to help create the IEP.<sup>116</sup> The information provided by the parents is instrumental in creating an IEP because the parents know the child better than any other member of the child's IEP team.<sup>117</sup> A parent is in a position to provide insight on the child's unique interests, learning styles, and struggles.<sup>118</sup> Parents share personal information about the child's history, offer suggestions, and perhaps most importantly, the parent can speak on the child's behalf in a way no other member of the IEP team can.<sup>119</sup>

Section 1414(d) of the Act provides a checklist of sorts for the IEP team:

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<sup>112</sup> *Id.* § 1414(a)(1)(D)(i)(1). It is important to remember that parental consent is required for the child to receive an evaluation, an IEP, and services. *Id.* The parent is an integral part of the process. Although parental consent is required for implementation of the IDEA's requirement in the child's education—giving the parent the belief that his or her role is crucial with regard to bullying—sometimes the parent's input is not considered. See *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289, 295 (E.D.N.Y. 2011) (discussing how the child's parents' attempts to discuss the child's bullying with the principal were "rebuffed").

<sup>113</sup> 20 U.S.C. § 1414(a)(1)(C).

<sup>114</sup> *Id.* § 1414(b)(2)(A)(ii).

<sup>115</sup> *Id.* § 1414(d)(1)(B)(i)–(vii).

<sup>116</sup> *Id.* § 1414(b)(2)(A).

<sup>117</sup> THERESA REBHORN, NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, DEVELOPING YOUR CHILD'S IEP 6 (2009), available at <http://nichcy.org/wp-content/uploads/docs/pa12.pdf> (offering the parent information on the IEP and how the process works and "how to be an effective partner with [the parent's] child's school," and emphasizing the importance of the parent's role).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

The IEP should contain: a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided to the child and of the program modifications or supports for school personnel that will be provided to the child; an explanation of the extent, if any, to which the child will not participate with nondisabled children in regular classes and other activities; a statement of any individual modifications in the administration of state or district assessments of student achievement; the projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications; and, beginning at age fourteen, an annually updated statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's course of study.<sup>120</sup>

The overall goal of providing disabled students with an IEP is to increase the child's progress in the "general education curriculum."<sup>121</sup> To reach this goal, IEPs commonly enumerate services or aids that the child may require<sup>122</sup> and the therapy treatments that the child will receive.<sup>123</sup> The process of developing an IEP will likely vary across districts and jurisdictions. In general, the IEP team must determine whether any modifications to the student's special education are needed to enable the child to meet annual goals established by the team.<sup>124</sup> The IDEA enumerated four considerations in developing an IEP: the child's strengths; the parental concerns regarding enhancing the child's education; the child's evaluation; and the child's academic, developmental, and functional needs.<sup>125</sup>

Some jurisdictions established particular guidelines for developing an IEP to assist schools in the creation of these documents that expound upon the IDEA's expressed considerations. For instance, New York requires the following four factors to be considered in developing a child's IEP: "(1) academic achievement and learning characteristics, (2) *social development*, (3) physical development, and

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<sup>120</sup> Laddie C. *ex rel.* Joshua C. v. Dep't of Educ., No. CV. No.08-00309, 2009 WL 855966, at \*2 (D. Haw. Mar. 27, 2009) (citing 20 U.S.C. § 1414(d)(1)(A) (2006)).

<sup>121</sup> 20 U.S.C. § 1414(b)(2)(A)(ii) (2012).

<sup>122</sup> See, e.g., WIS. DEP'T OF PUB. INSTRUCTION, A GUIDE FOR WRITING IEPs 20–21 (2010) [hereinafter GUIDE FOR WRITING IEPs], available at <http://dpi.wi.gov/files/sped/pdf/iepguide.pdf>. IEPs will describe the service in terms of location and duration. *Id.*

<sup>123</sup> MCCOY, *supra* note 51, at 19–20. Therapy might include speech therapy, occupational therapy, physical therapy, or behavioral therapy. See *id.* at 19–31.

<sup>124</sup> 20 U.S.C. § 1414(c)(1)(B)(iv).

<sup>125</sup> *Id.* § 1414(d)(3)(A)(i)–(iv).

(4) managerial or behavioral needs.”<sup>126</sup> The Wisconsin Department of Public Instruction created a Guide for Writing IEPs, which suggests that the IEP team include *social-emotional needs* in the discussion of needs related to the child’s disability.<sup>127</sup> Generally, however, the IDEA expresses no requirement that schools address students’ social-emotional development within IEPs.<sup>128</sup> The standard for what constitutes a free appropriate public education is described in the next section.

*A. Interpretation of the IDEA’s Free Appropriate Public Education Requirement*

*Board of Education v. Rowley* interpreted the congressional mandate to provide children with a free appropriate public education (FAPE).<sup>129</sup> The Supreme Court first interpreted what would satisfy the Education for All Handicapped Children Act of 1975’s guarantee of a FAPE in *Rowley*, where parents of a hearing-impaired child filed a lawsuit, claiming that she was denied a FAPE when her school did not provide her with a sign-language interpreter as part of her special education plan.<sup>130</sup> The Court found that schools do not need to provide the child with services that would “maximize” each child’s potential,<sup>131</sup> but that a sufficient FAPE is achieved where the “‘specially designed instruction’” will provide the child with “some educational benefit.”<sup>132</sup>

By requiring “some educational benefit,” the *Rowley* decision set a fairly low standard for what would satisfy the FAPE requirement. *Rowley* required public schools to ensure that the child receive an “individually designed” education according to the particular needs of each child that are “reasonably calculated” to provide the child with the educational benefit.<sup>133</sup> These programs must be uniquely tailored

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<sup>126</sup> T.K. *ex rel.* L.K. v. N.Y.C. Dep’t of Educ., 779 F. Supp. 2d 289, 309–10 (E.D.N.Y. 2011) (emphasis added).

<sup>127</sup> GUIDE FOR WRITING IEPs, *supra* note 122, at 13 (emphasis added).

<sup>128</sup> See 20 U.S.C. § 1414.

<sup>129</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 200–01 (1982).

<sup>130</sup> *Id.* at 184, 186.

<sup>131</sup> *Id.* at 198.

<sup>132</sup> *Id.* at 200–01.

<sup>133</sup> *Id.* at 201, 206–07.

to each child, as “[n]o one program has been documented as being applicable to all children with autism.”<sup>134</sup>

Although *Rowley* set the floor for what was minimally sufficient to provide an appropriate education for disabled children, over time, a “slight majority” of appellate courts have articulated a more demanding standard to which schools must adhere.<sup>135</sup> Instead of merely requiring *access* to education, the standard was increased to a “meaningful benefit standard,”<sup>136</sup> which requires schools to provide children with access to a *meaningful* education, as opposed to only “some educational benefit.” While it is possible that a parent may be able to make out a claim that bullying prevented the child from receiving *any* educational benefit, thus satisfying the original *Rowley* standard, it would be easier for parents to make a claim that the school failed to provide the child a *meaningful* benefit. It can be difficult to determine when a school has not provided a child an appropriate education.

One test to determine whether a school has failed to provided a FAPE looks at two threshold questions: the first question considers whether bullying was isolated or persistent, and the second question applies *Rowley*’s two-part analysis, “with the *ultimate question being whether the IEP was deficient* because it did not include effective instruction and supports designed to minimize bullying and was not designed for the student to make reasonable progress in developing appropriate peer relationships.”<sup>137</sup> As illustrated by the above-proposed framework, the IEP’s adequacy is the central question. Where the FAPE has not been provided to students, parents might seek a remedy through the courts.

### *B. Remedies Under the IDEA*

If parents believe the IEP is inadequate to provide a FAPE, they may have a remedy under the IDEA to obtain a more meaningful education for their child. After parents exhaust all administrative remedies, they may file a lawsuit against the school to claim that their

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<sup>134</sup> MCCOY, *supra* note 51, at 26.

<sup>135</sup> David Ferster, *Broken Promises: When Does a School’s Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 87–95 (2009-2010) [hereinafter *Broken Promises*].

<sup>136</sup> *Id.* at 82.

<sup>137</sup> *Deliberately Different*, *supra* note 70, at 217 (emphasis added).

child was denied a FAPE in order to receive tuition reimbursement or an adjustment to the IEP.<sup>138</sup>

First, parents might remove their child from the public school where the child's education is inadequate; after removal, parents may seek private school tuition reimbursement under the IDEA.<sup>139</sup> For instance, consider the introductory example of L.K., the twelve-year-old girl who was chased, isolated, and pushed by her classmates.<sup>140</sup> Her parents believed she was not receiving an adequate education in her public school, and they enrolled her in a private school based on their belief that bullying barred her from receiving a FAPE.<sup>141</sup> The Supreme Court has acknowledged that private school tuition reimbursement is an available remedy under the IDEA when the public school is unable to provide the child a FAPE.<sup>142</sup> The Court has said that where public school officials wish to avoid reimbursing parents for private school tuition, the public school can either provide the child with a FAPE or place the child in an alternative private setting.<sup>143</sup>

This serves as an alert to public schools that it must make a genuine attempt at providing disabled children with a FAPE, lest it be accountable for that child's private school tuition. Therefore, unless the public school cannot accommodate the needs of a particular student, it is in the school's interest to develop an IEP that services those needs to avoid lengthy and costly litigation with the ultimate possible outcome of having to reimburse a family's private school tuition.

Alternatively to tuition reimbursement, parents might also sue schools for an adjustment to an existing IEP. For example, an IEP might require that the child be placed in a special program or an alternative educational setting.<sup>144</sup> Similarly, the IEP might require mental health services that will serve the child's psychological needs.

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<sup>138</sup> See 20 U.S.C. § 1415(i)(2)(A) (2012).

<sup>139</sup> See generally *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011); *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993).

<sup>140</sup> *T.K.*, 779 F. Supp. 2d at 294, 296.

<sup>141</sup> *Id.* at 293, 295.

<sup>142</sup> *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

<sup>143</sup> *Carter*, 510 U.S. at 15.

<sup>144</sup> *Broken Promises*, *supra* note 135, at 75–76 (“Whenever a school agrees in an IEP to provide certain services or supports the law should require it fully implement those services.”).

Special services might also be in the form of speech therapy, occupational therapy, and various methods of behavioral therapy, which are used to aid autistic children.<sup>145</sup>

An alternative educational setting might be simply allowing the child to break apart from other students, or it might mean removing the child to a new location for particular segments of the day.<sup>146</sup> Parents might request one of the foregoing services or alterations to be included in their child's IEP to protect him from bullying. To prevent bullying before it reaches the level that would cause the need for a remedy through the courts, IEPs should address bullying. Some other provisions of the IDEA suggest that the Act imposes a duty on schools to protect disabled children from bullying.

*C. IDEA Provisions Which Suggest Schools Have Some Duty to Protect Disabled Students from Bullying*

The IDEA does not include a provision that explicitly requires schools to protect disabled children from bullying.<sup>147</sup> However, the IDEA contains provisions that imply such a duty exists. First, the IDEA expresses a preference toward mainstreaming disabled children into classrooms and extracurricular activities with neurotypical students.<sup>148</sup> Second, the IDEA established that schools must provide disabled students with ancillary services.<sup>149</sup>

First, the IDEA expresses the goal of mainstreaming disabled children into classrooms with neurotypical children.<sup>150</sup> The IDEA expresses the goal that the child will be “educated and *participate* with other children with disabilities and nondisabled children” to this

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<sup>145</sup> Eric Peacock, *Top 8 Autism Therapies—Reported by Parents*, AUTISM SPEAKS (Sept. 25, 2012), <http://www.autismspeaks.org/blog/2012/09/25/top-8-autism-therapies-%E2%80%9393-reported-parents>.

<sup>146</sup> See generally Bonnie Sayers, *Classroom Modifications for the Autistic Student*, BELLAONLINE, <http://www.bellaonline.com/articles/art35123.asp> (last visited Nov. 16, 2013); *Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 196 (3d Cir. 2004) (noting that the child was provided an alternate gym class setting where he was bullied during the mainstream gym class).

<sup>147</sup> See generally 20 U.S.C. §§ 1400–1415 (2012).

<sup>148</sup> See *id.*

<sup>149</sup> *Mark H. v. Lemahieu*, 513 F.3d 922, 925 n.1 (9th Cir. 2008) (“The IDEA does not use the term ‘mental health services,’ but requires states to provide ‘related services’—including, for example, ‘psychological services, physical and occupational therapy . . . [and] social work services’—as may be required to assist a child with a disability to benefit from special education.”) (alteration in original) (quoting 20 U.S.C. §§ 1401(26), 1412)).

<sup>150</sup> MCCOY, *supra* note 51, at 162.

end.<sup>151</sup> The Act also expresses the goal of “enabling the child to be involved in and progress in the general education curriculum.”<sup>152</sup> The phrase “general education curriculum,” implies the opposite of “special education,” meaning that the goal is for the child’s special education to eventually progress to allowing the child to participate in the general education curriculum alongside neurotypical students. If mainstreaming is the goal, then it follows that the child would necessarily need to be able to interact with his neurotypical peers.

The IDEA also expresses a preference to mainstream disabled children with neurotypical children in activities outside of the classroom. The IEP should contain services and aids that will allow the child “to participate in extracurricular and other nonacademic activities.”<sup>153</sup> This suggests that the IDEA not only provides for the child to succeed academically but also socially. For example, one student’s IEP contained a provision that the student was to participate in “community-based activities” to provide him with “socialization skills.”<sup>154</sup> If a goal of the IDEA is to enable the disabled child to succeed socially, but the child’s ability to succeed academically and socially is adversely affected by bullying, the IEP must address any social struggles the child faces because the IEP is the main tool helping students achieve academic success.

If the goal of creating the child’s IEP is to ensure participation between the disabled child and neurotypical children, this participation must be possible. It will not be possible where a child is consistently bullied. As earlier stated, children with ASDs have difficulty interacting with others socially and, as a result, are picked on.<sup>155</sup> This goal of the IDEA should be interpreted as placing a duty upon schools to evaluate not only academic capabilities but also the child’s social capabilities. Because peer harassment is a great hindrance to participating academically and socially with neurotypical children, the school should have the duty to determine how to protect the child from bullying.

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<sup>151</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(cc) (emphasis added).

<sup>152</sup> *Id.* § 1414(b)(2)(A)(ii).

<sup>153</sup> *Id.* § 1414(d)(1)(A)(i)(IV)(bb).

<sup>154</sup> *In re F.E.P., Jr.*, 716 S.E.2d 268, No. COA11-348, WestlawNext, at \*3 (N.C. Ct. App. Sept. 20, 2011).

<sup>155</sup> See, e.g., Anderson, *supra* note 19; O’Connor, *supra* note 42.

Additionally, the IDEA imposes a duty to provide “related services” to supplement the child’s special education.<sup>156</sup> Although the Act does not use the term “mental health services,” it does enumerate such related services as “psychological services.”<sup>157</sup> The U.S. Department of Education determined that the Hawaii Department of Education was responsible for furnishing mental health services to special education students when the child proved to be in need of such services.<sup>158</sup> In *Felix v. Waihee*, a class of disabled children sued the Hawaii DOE, claiming that their schools failed to comply with the IDEA and § 504 by failing to provide mental health services to children with disabilities as part of their special education plan.<sup>159</sup> The district court agreed with the *Felix* plaintiffs, finding the Department of Education failed to provide the necessary mental health services as part of their education plans.<sup>160</sup>

One court upheld an administrative ruling acknowledging that a student’s “social-emotional growth” must necessarily be monitored.<sup>161</sup> In *Souza v. State*, a school psychologist believed a student’s depression and anxiety were affecting his educational progress, and that he would have benefitted from mental health services.<sup>162</sup> The student’s psychiatrist later acknowledged that some form of bullying could be contributing to this anxiety.<sup>163</sup> Where schools have a duty to provide psychological services, it follows that schools have a duty to evaluate the child’s emotional status and include a plan to address any emotional issues in the IEP. Because bullying can degrade a child’s emotional status, causing depression, anxiety, and thoughts of suicide,<sup>164</sup> it likely causes a need for these psychological ancillary services. The next Part will propose an

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<sup>156</sup> 20 U.S.C. §§ 1401(26), 1414(d)(1)(A)(i)(IV).

<sup>157</sup> *Id.* § 1401(26)(A).

<sup>158</sup> Mark H. v. Lemahieu, 513 F.3d 922, 925 (9th Cir. 2008).

<sup>159</sup> *Id.* at 926 (citing *Felix v. Waihee*, CV. No. 93-00367-DAE).

<sup>160</sup> *Id.*

<sup>161</sup> *Souza v. State*, Dep’t of Educ., No. CV074014002S, 2007 WL 4754963, at \*8–9 (Conn. Super. Ct. Dec. 26, 2007). The school was proactive in attempting to provide the child with an appropriate education. *Id.* at \*1. He was evaluated by the school psychologist, an occupational therapist, a physical therapist, and a speech therapist. *Id.* His IEP contained academic goals and functional goals related to two subjects (language arts and mathematics) and a speech goal. *Id.* at \*2. However, the parents argued that the boy’s IEP was deficient because it did not address emotional goals. *Id.* at \*9.

<sup>162</sup> *See id.* at \*1.

<sup>163</sup> *See id.* at \*7.

<sup>164</sup> *See generally* Nishina, Juvonen & Witkow, *supra* note 24, at 37, 45–46.



amendment to the IDEA that requires schools to address bullying in IEPs by evaluating the child's social development and ability.

## VI

### PROPOSAL: INDIVIDUALIZED EDUCATION PLANS MUST ADDRESS BULLYING

Although parents can sue schools to obtain tuition reimbursement or to obtain an alteration to the child's IEP after the child has experienced bullying, this Article proposes a requirement to create an effective IEP before the child suffers potentially irreparable damage from bullying. The IDEA should be amended to require schools to evaluate the child's social development and ability and create social-emotional goals within the IEP, taking peer harassment into account. Evaluating the child's social development and ability will involve determining the child's social skills and shortcomings. The next section will first discuss possible alterations to the IEP that could be used to address bullying and will then discuss how the IDEA can be reformed to include the alterations.

#### *A. Alterations Within the IEP—How Alterations Have Been Sought and Why They Are Necessary*

IEPs can include unique goals and services that address the child's individual needs. The IEP goals might focus on bullying prevention or altering the child's negative reaction to being bullied. Alterations can be made by changing the child's learning environment, changing the location, or implementing a bullying prevention procedure for the victim to use to prevent bullying or avoid it when it occurs.

Sometimes a child with an ASD may benefit from altering the environment in which the child is instructed. For instance, one author suggests adaptations such as covering the clocks in the classroom if a child with an ASD becomes stressed by time, causing outbursts that attract bullying.<sup>165</sup> A child might also be allowed to take walks outside where periodic time away from the classroom would minimize stress.<sup>166</sup> Another student might benefit from changing his location within a classroom depending on how the child with an ASD responds to particular areas.<sup>167</sup>

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<sup>165</sup> MCCOY, *supra* note 51, at 165.

<sup>166</sup> *Id.*

<sup>167</sup> Sayers, *supra* note 146.

Although mainstreaming autistic children in classrooms with neurotypical students is preferred,<sup>168</sup> one of the effective methods might be segregating the child from exposure to bullying in particular circumstances. For instance, in one case, a boy was bullied and teased by his classmates, especially during his gym class.<sup>169</sup> To address this issue, his IEP team included an alternative physical education class for him so that he could avoid changing in the locker room.<sup>170</sup> Separating the child is appropriate where the time and location of bullying can be identified. For example, in another case, a child was bullied on the school bus, which he rode with neurotypical students who picked on him due to his mental retardation.<sup>171</sup> In that case, it may have been appropriate to consider alternative transportation to remove the child from the bullies during that portion of the day. Although this form of IEP modification is not always ideal because mainstreaming the student with neurotypical children is a common goal, it might be appropriate to prevent bullying where it occurs in particular locations or times.

Creating a bullying prevention procedure for individual students might also be successful. In one case, parents sued their son's school for negligence after he was involved in an altercation with another student that left him blind in one eye.<sup>172</sup> The school was aware that the student, a boy with Asperger syndrome, was often teased and bullied by his classmates and that he needed assistance with "social negotiation."<sup>173</sup> Unlike other cases in which the school was aware of the bullying but nothing was done to address it, the boy's IEP team had created a bullying prevention procedure by establishing a "card system," which allowed him to signal the teacher when he was being bullied.<sup>174</sup>

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<sup>168</sup> MCCOY, *supra* note 51, at 162 ("Measurable goals and objectives or benchmarks to reach them if the student is in functional or modified curriculum are meant to lead toward additional and successful participation in general curriculum.").

<sup>169</sup> Shore Reg'l High Sch. Bd. of Educ. v. P.S. *ex rel.* P.S., 381 F.3d 194, 196 (3d Cir. 2004). P.S. did not have autism but did receive an IEP. *See id.* at 195–96. P.S. experienced significant bullying, which resulted in his depression and declining grades. *Id.* at 195. The bullying P.S. experienced was "so intense that P.S. attempted suicide" during the eighth grade. *Id.* at 196.

<sup>170</sup> *Id.*

<sup>171</sup> Silano v. Bd. of Educ., 23 A.3d 104, 109–10, 112 (Conn. Super. Ct. 2011) (noting that a student was bullied at school in addition to being bullied on the school bus.).

<sup>172</sup> Phillips *ex rel.* Gentry v. Robertson Cnty. Bd. of Educ., No. M2012-00401-COA-R3-CV, 2012 WL 3984637, slip op. at \*1 (Tenn. Ct. App. Sept. 11, 2012).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

His IEP also contained “preferential seating” so that the student could avoid being bullied.<sup>175</sup> The Bullying Prevention and Research Institute Education Development Center created a guide (the IEP guide) to instruct IEP teams on how to address bullying within IEPs, which suggested seating students near friends and away from bullies.<sup>176</sup> It also suggested setting up a procedure that would allow a child to exit the classroom briefly to a “safe room” at times when the student is being bullied, and then permit the student to return to the classroom.<sup>177</sup> These are just some examples of bullying prevention procedures that might be developed for each child’s particular needs.

It is possible to develop each child’s IEP with the goal of preventing bullying despite the fact that social and emotional goals are not part of the traditional academic curriculum.<sup>178</sup> However, social-emotional goals can be written into the IEP after evaluating the circumstances surrounding social issues.<sup>179</sup> The IEP guide suggested evaluating the circumstances surrounding the bullying by making several inquiries.<sup>180</sup> For instance: Does the student feel safe at school? Are you aware that the student is bullied or teased? Where does the bullying occur? Does the student exhibit behaviors or have a disability that may make the student a bullying target? What supports or aids might be necessary to protect the student from bullying or discontinue behaviors that other students might perceive as bullying?<sup>181</sup> To develop a plan that best suits the child’s needs and ultimate goal of preventing bullying, the child’s IEP team needs to answer all of these questions, and likely many others, with the goal of determining the unique circumstances surrounding the child’s experience with peer harassment.

While it is true that this type of detailed analysis would take significant time and effort, it is likely within the school’s best interest. Because schools can be held accountable “for failing to prevent

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<sup>175</sup> *Id.*

<sup>176</sup> Ed Donnelly, Kim Storey & Ron Slaby, *Bullying Prevention and Intervention: A Guide for the Individualized Education Program (IEP) Team*, BULLYING PREVENTION & RES. INST. EDUC. DEV. CTR. 1, 6 (2011), [http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/82/iep\\_guide\\_web\\_11-4-11b.pdf](http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/82/iep_guide_web_11-4-11b.pdf).

<sup>177</sup> *Id.* at 6.

<sup>178</sup> *Developing Your Child’s IEP*, NAT’L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES (Apr. 2009), <http://www.parentcenterhub.org/repository/pa12/>.

<sup>179</sup> *Id.*

<sup>180</sup> Donnelly, Storey & Slaby, *supra* note 176, at 5.

<sup>181</sup> *Id.*

bullying, they may be motivated to develop more successful programs, and victims of bullying may find relief.”<sup>182</sup> Therefore, an amendment to the IDEA that would impose requirements upon schools across all states would benefit the schools and the bullied children. Although an IEP’s inclusion of an analysis of the child’s social development and susceptibility to bullying to prevent bullying of a disabled student has not been universally accepted, it might be a step in the right direction.

*B. Reform Within the IDEA to Require that IEPs Address Social Development and Bullying*

Although parents can sue schools when they believe their child is not receiving the IDEA’s guaranteed free appropriate public education because of bullying, it is not an ideal remedy. It is not ideal because it does not create a solution to the problem of bullied children with disabilities—and commonly children with autism spectrum disorders—such that these children can receive an adequate education. Amending the IDEA will not completely resolve the problem, but it will require schools to at least address the issue.

This proposed amendment to the IDEA would require schools to address not only academic progress but social progress as well. The amendment would require the child’s evaluation to include reports from parents and the student regarding social problems, reports from the student’s classroom aides or teachers, and observation of the child in the classroom and on the playground. Similar reports and observations are already mandated by the IDEA;<sup>183</sup> however, the evaluation requirements should specifically require these for evaluating the child’s social development and ability and not merely for the child’s academic ability.

In addition to requiring these evaluation criteria, § 1441(d) should also be expanded to include social-emotional issues and goals within the child’s IEP, which would include bullying that the child experiences. If the IDEA is amended to require schools to address bullying in IEPs, schools will be forced to take bullying into account amongst the other important educational goals. If the school takes bullying into account, it is taking responsibility for providing the child’s needed protection. This Article proposes that if the IDEA is

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<sup>182</sup> *Deliberately Different*, *supra* note 70, at 201.

<sup>183</sup> 20 U.S.C. § 1414(c)(1)(A)(i)–(iii) (2012).

amended to require schools to address bullying, then bullying of children with autism and other disabilities will decrease.

### CONCLUSION

If a child was anxious, or dealing with issues of self-control, or unable to focus before there was any bullying, imagine how impossible those issues must seem when bullying is added to the mix.<sup>184</sup>

—Connie Anderson

Bullying has received national attention over the last decade, with activist-awareness groups, prevention plans, and even an address from the White House. Similarly, while autism spectrum disorder used to be a relatively unknown neurological disorder, awareness has risen along with the rise in ASD diagnoses. Children with autism are bullied at a significantly higher rate than neurotypical children and at a slightly higher average rate than children with other disabilities. Children with autism exhibit unique mannerisms and are plagued with social deficits that make them “perfect targets” of bullying.

Bullying can greatly impede a child’s education. Not only does peer harassment cause stress to physical and mental health, but it can also jeopardize the child’s academic performance. Some remedies are available for these children and their parents. Although anti-bullying legislation does not provide a cause of action for students and schools do not have a constitutional duty to protect all students, parents might have grounds to seek a relief under federal anti-discrimination statutes. Parents can bring harassment claims against schools under Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act, but neither option provides an effective remedy for disabled students who will claim that bullying deprived them of an adequate education because it does not provide a solution to the bullying.

The Individuals With Disabilities Education Act (IDEA) guarantees disabled children a free appropriate public education (FAPE). Schools provide children with a FAPE by developing an individualized education plan for each child that is uniquely tailored to each child’s special needs. Although *Rowley* set a low floor for what constituted an appropriate education, the floor has been raised somewhat over time, which broadens parents’ opportunity to gain

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<sup>184</sup> Anderson, *supra* note 19.

relief when the child has been denied a FAPE. Indeed, some courts have found that bullying can constitute a denial of a FAPE. Where the school has failed to provide the bullied child with a FAPE, parents may bring a claim against the school to gain private school tuition reimbursement or to demand an alteration to their child's inadequate IEP. Additionally, some provisions of the IDEA indicate that it imposes a duty upon schools to address bullying, but the IDEA does not explicitly include any provision that specifically requires schools to consider social or emotional goals within the child's IEP.

Currently, the average IEP includes a statement of the child's academic, functional, and developmental goals but does not necessarily include a statement of the child's social or emotional goals related to bullying. An IEP can contain goals related to the child's bullying, using the IEP as a tool to develop a bullying prevention plan for the child. Because the IDEA does not currently require IEPs to include social-emotional goals, this Article proposes an amendment to the IDEA that would reform the statute to require schools to address the child's social development and related issues within each child's IEP. The child's social abilities would be evaluated, which not only would include a bullying assessment but would also enable the IEP team to develop programs to prevent bullying from occurring.

With autism rates at one in sixty-eight children and bullying rates of children with autism spectrum disorders hovering around sixty-three percent, something must be done to avoid the ramifications to these vulnerable children. It is time to start making changes at the base level—within the child's IEP—before it is too late to make a change.